Co-operative Central Bank Ltd (in receivership) & Ors v The Industrial Court of Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8–25–135 OF 1989
ABU MANSOR J
23 MARCH 1994

Companies and Corporation *— Receivers — Appointed by the court pursuant to the Emergency (Essential Powers) Act 1979 — Whether prior leave of court required before receivers could be sued — Emergency (Essential Powers) Act 1979*

Companies and Corporation *— Receivers — Appointed by the court pursuant to the Emergency (Essential Powers) Act 1979 — Whether receivers could be joined as party to the court action in their personal capacity — Emergency (Essential Powers) Act 1979*

The second and third plaintiffs were appointed receivers ('the receivers') of the first plaintiff, the Co-operative Central Bank Ltd ('the CCB'), by an order of the court. As receivers, they were charged with the duty to manage and assume the duties of the directors of CCB. Proceedings were instituted in the Industrial Court, by a number of ex-employees of the CCB against the receivers. The Industrial Court rejected the objection that prior leave of the court had to be obtained before the ex-employees could proceed against the receivers. The Industrial Court further ordered that the receivers be joined as a party to the proceeding in the court, in their personal capacity. The receivers applied to the High Court for an order of certiorari to remove into the High Court the award of the Industrial Court for the purpose of it being quashed; for a further order of prohibition to prohibit the Industrial Court from proceeding further with the cases before that court; and for costs of and incidental to the application be costs in the cause.

The issues before the court were: (i) whether prior leave of the High Court was necessary before proceedings could be instituted in the Industrial Court against the receivers; and (ii) whether the Industrial Court had erred in law, in joining the receivers as parties in their personal capacity, in the matters that were before the court.

Held, allowing the application:

(1) Leave of the court is required before action is commenced against the receivers. Therefore, the Industrial Court had committed an error in making an order that leave was not required for the receivers to be sued.

(2) The receivers were appointed under the Emergency (Essential Powers) Act 1979 with a specific duty to nurture the CCB to health and they work subject to the directions of the Central Bank and the courts. It would be unjust to make the receivers personally liable in the circumstances and if that were to happen, it would

certainly frighten away would be future receivers who genuinely wish to come and help in this rescue operation. The Industrial Court had therefore committed an error in making them parties with the clear intention of making them liable.

[Bahasa Malaysia summary

Plaintif kedua dan ketiga telah dilantik sebagai penyelesai ('penyelesai itu') Co-operative Central Bank Ltd ('CCB'), melalui suatu perintah mahkamah. Sebagai penyelesai, mereka telah diberi tugas untuk mengurus dan mengambil alih tugas pengarah CCB. Prosiding telah dimulakan di Mahkamah Perusahaan oleh beberapa orang bekas pekerja CCB terhadap penyelesai itu. Mahkamah Perusahaan telah menolak bantahan bahawa kebenaran mesti diperolehi daripada mahkamah terlebih dahulu sebelum bekas pekerja itu boleh memulakan tindakan undang-undang terhadap penyelesai itu. Mahkamah Perusahaan juga memerintahkan supaya penyelesai itu dicantum sebagai sebuah pihak kepada prosiding di mahkamah, dalam keupayaan peribadi mereka. Penyelesai itu telah memohon kepada Mahkamah Tinggi untuk suatu perintah certiorari supaya award Mahkamah Perusahaan itu dipindah ke Mahkamah Tinggi untuk dibatalkan; untuk suatu perintah larangan supaya menghalang Mahkamah Perusahaan daripada meneruskan dengan kes-kes di hadapan mahkamah itu; dan supaya kos bagi dan yang berkaitan dengan permohonan itu merupakan kos dalam kausa.

Isu-isu di hadapan mahkamah adalah: (i) sama ada kebenaran terdahulu diperlukan daripada Mahkamah Tinggi sebelum prosiding boleh dimulakan terhadap penyelesai itu; dan (ii) sama ada Mahkamah Perusahaan telah membuat kesilapan dari segi undang-undang apabila mencantumkan penyelesai sebagai sebuah pihak dalam keupayaan peribadi mereka, dalam perkara di hadapan mahkamah.

Diputuskan, membenarkan permohonan itu:

(1) Kebenaran mahkamah diperlukan sebelum suatu tindakan boleh dimulakan terhadap penyelesai itu. Oleh itu, Mahkamah Perusahaan telah membuat kesilapan apabila ia membuat perintah bahawa kebenaran tidak diperlukan sebelum penyelesai boleh didakwa.

(2) Penyelesai itu telah dilantik di bawah Akta Darurat (Kuasa-Kuasa Perlu) 1979 dengan tugas khas supaya memulihkan CCB dan mereka telah membuat kerja mereka tertakluk kepada perintah Bank Pusat dan mahkamah. Adalah tidak adil jika penyelesai didapati bertanggungan secara peribadi di dalam keadaan sedemikian dan jika ia berlaku, ia tentu akan menakutkan bakal penyelesai yang benar-benar ingin membantu dalam operasi penyelamat. Oleh itu, Mahkamah Perusahaan telah membuat suatu kesilapan apabila menjadikan mereka pihak dengan tujuan jelas supaya membuat mereka bertanggungjawab.]

[*Editorial Note*: The 96 employees from amongst the second, third and fourth respondents have appealed to the Supreme Court.]

Cases referred to

1 *Co-operative Central Bank Ltd v Wong Pot Heng* [1989] 2 ILR 4 (refd)
2 *Wong Pot Heng v Co-operative Central Bank Ltd* Supreme Court (Civil Appeal No 02–307–1989) (unreported) (folld)
3 *Bank Negara Malaysia v Co-operative Central Bank Ltd* [1993] 3 MLJ 460 (refd)
4 *Thein Tham Sang v United States Army Medical Research Unit & Anor* [1983] 1 MLJ 97 (refd)
5 *Bank Negara Malaysia v Co-operative Central Bank Ltd (Jaffnese Co-Operative Society Ltd & Ors, Intervenors)* [1994] 1 MLJ 170 (folld)

Peh Lee Kheng (*P Jayasingam* with her) (*Shearn Delamore & Co*) for the first, second and third applicants.

KP Gengadharan (*N Mahalingam* with him) (*Genga Maha Wong & Co*) for 289 out of 369 employees of the second respondent.

LG Seah (*P Kuppusamy & Co*) for 84 out of 149 employees of the fourth respondent.

Adam bin Bachek (*Adam Bachek & Associates*) for the 96 employees from amongst the second, third and fourth respondents.

Wong Pot Heng in person.

Abu Mansor J: In encl (6) dated 15 February 1990, the applicants applied for the following:

(1) an order of certiorari to remove into this court for the purpose of it being quashed, the whole of the decision of the Industrial Court in Industrial Court Case Nos 4/4–262/89, 4/4–270/89 and 4/4–271/89 (Consolidated), Award 204/89;
(2) an order of prohibition to prohibit the Industrial Court of Malaysia from proceeding or proceeding further in the matter of Industrial Court Case Nos 4/4–262/89, 4/4–270/89 and 4/4–271/89, award 204/89; and
(3) the costs of and incidental to this application be costs in the cause.

The second and third plaintiffs are receivers of the first plaintiff having been appointed by court vide order dated 7 March 1989 with duties to manage and assume the duties of the directors of the first respondent. In its history, the validity of the order was challenged (see p 4 exh BA–1–9). The Supreme Court dismissed the appeal and confirmed the High Court's order of appointing them as receivers. To put their appointment in perspective, it is worthy of mention that the second and third plaintiffs were appointed receivers under special circumstances and pursuant to the Emergency (Essential Powers) Act 1979.

At the Industrial Court hearing of the impugned matter or award, objection was taken that leave had first to be obtained to bring the action against the second and third applicants/receivers. The learned chairman of

the Industrial Court dismissed the objection holding that leave was not required. The learned chairman also made an order that the second and third applicants be joined as a party to the pending action therein and the Industrial Court was prepared to hear the action on its merits after joining the second and third applicants/receivers. Hence this application before this court vide encl (6).

It is not disputed by all appearing that essentially, the issues before this court in encl (6) are as follows:

(i) was leave necessary before the second and third applicants/receivers can be sued; and
(ii) did the Industrial Court err in law in joining them as parties in their personal capacities?

The applicants' counsel, Cik Peh Lee Kheng, contended that the Industrial Court had so erred in making the order he did. She cited *The Law Relating to Receivers, Managers and Administrators* by Hubert Picarda as to the status of second and third applicants at p 339:

> A receiver, in the words of Viscount Haldane LC, 'is an officer of the court put in to discharge certain duties prescribed by the order appointing him'. ... He is 'nothing more than the hand of the court'. ... for the purpose of holding the property of the litigants, ... and the possession of the receiver is simply the possession of the court.

Then at p 373 of the textbook, *The Law of Receivers* (2nd Ed) by PS Atchuthen Pillai, at para 27:

> Suit without leave is contempt of court and will be dismissed. A suit against a receiver when filed without leave of court is liable to be dismissed ...
>
> Institution of proceedings against a receiver without leave of the court is contempt of court. It is incompatible with the dignity and authority of the court to allow its officer to be summoned before any tribunal ...

Then in *Co-operative Central Bank Ltd v Wong Pot Heng*,[1] when dealing with a preliminary objection, the court held that no action shall be allowed to be prosecuted against a receiver without the leave of the court.

Then in *Wong Pot Heng v Co-operative Central Bank Ltd*[2] the Supreme Court dismissed the appellants' appeal and held that leave to sue a receiver is required. This court in *Bank Negara Malaysia v Co-operative Central Bank Ltd*[3] has held that leave is required before action can be commenced against a receiver.

I find merit in the argument of the applicants' counsel that the authorities are too clear to be deviated from that leave is required before action is commenced against the second and third applicants.

I also dismissed as without merit the argument of the respondents that the requirement of obtaining leave before commencing an action is not borne out by any provision of the law, and equally, I find devoid of merit the respondents' argument that the requirement of obtaining leave fetters the Minister of Human Resources' power to refer and the time taken to ask for leave prevents the matter from being litigated without delay.

The decision of the Supreme Court must be accorded respect by this court following judicial precedents. Provision exist in the High Court Rules

where leave must be obtained for certiorari or for contempt and leave must be obtained within a specified time before it is time-barred, all these provisions requiring leave first remains valid and had been consistently followed without difficulty and I find no merit in the argument of the respondent that the workers' right will be hindered or obstructed by the plaintiffs/applicants having first to obtain leave.

In view of the fact that the Industrial Court had acted on wrong principles that leave is not required in such clear law and the decided cases, the court holds that leave is a condition precedent to bringing an action against the receivers.

On this ground alone, this court finds that the Industrial Court had committed an error in making an order that leave is not required for the receivers to be sued. The award in question is Award 104/89.

The court is mindful that in certiorari, the proper approach is to enquire into the decision-making process. It is not an appeal.

The Industrial Court in arriving at its decision to make that order completely ignored a current decision of the Supreme Court and went on to apply a decision of India on a provision not even in pari materia with the relevant Malaysian provision. The said decision ignored what had been stated in *Thein Tham Sang v United States Army Medical Research Unit & Anor*[4] at p 99 where Hashim Yeop A Sani J (as he then was) held that the Industrial Relations Act 1967 of our country is unique and it has no equivalent in India or elsewhere and at best, the authorities there can only be used as guide. Here, the decision of the Supreme Court on this matter stares us in the face. I therefore hold that the Industrial Court had committed an error and I therefore grant prayer (1) in terms of the motion in encl (6).

I now deal with the second issue as to whether receivers can be joined as parties in their personal capacity. My short answer is, I apply my judgment in *Bank Negara Malaysia v Co-operative Central Bank Ltd*[5] and at p 174 in this matter, there cannot be the question of personal liability. The substance of which was they were appointed under the Emergency Regulations with a specific duty or task to perform, to nurture the said Co-operative Society to health with all public interest element as to the reason for their appointment and they work subject to the directions of the Central Bank and the courts. From this they must formulate their actions and perform their difficult tasks within that constraint and framework. It is unjust to make the second and third applicants personally liable in the circumstances and if that were to happen it would certainly frighten away would be future receivers who genuinely wish to come and help in this rescue operation. Bearing in mind what I have stated above, I also hold that the Industrial Court had committed an error in making them parties with the clear intention of making them liable. I allow the second prayer of the application in terms of the motion with costs, to the applicants with liberty to respondents to apply as to the question of costs.

Application allowed.

Reported by Wong Kim Fatt